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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID CAROL WELCH,

Defendant and Appellant.

C044739

(Super. Ct. No.
01F05317)

A jury convicted defendant David Carol Welch of 17 counts of committing lewd and lascivious acts upon his daughters, S.W. and C.W., who were under age 14 at the time of the offenses. (Pen. Code, § 288, subd. (b)(1).)¹ The jury also found true allegations that: (1) defendant engaged in substantial sexual conduct with the victims (§ 1203.066); (2) he committed the crimes against more than one victim (§ 667.61, subd. (b)); (3) section 803, subdivision (f) (section 803(f)) applied to

¹ Undesignated statutory references are to the Penal Code.

counts 1 through 12; and (4) section 803, subdivision (g) (section 803(g)) applied to counts 16 and 17. The jury deadlocked on counts 18 and 19, and the trial court declared a mistrial as to those counts.

The trial court sentenced defendant to an indeterminate term of 45 years to life with the possibility of parole on counts 13, 14 and 15, and a consecutive determinate term of 84 years on counts 1 through 12, 16 and 17. It imposed a \$10,000 restitution fine (§ 1202.4, subd. (b)), imposed and suspended a \$10,000 parole revocation fine (§ 1202.45), imposed a \$166 jail booking fee and a \$36 jail classification fee (Gov. Code, § 29550.3), and ordered defendant to pay victim restitution in an amount to be determined (§ 1202.4). Defendant received 860 days of presentence credit.

Citing *Stogner v. California* (2003) 539 U.S. 607 [156 L.Ed.2d 544] (*Stogner*), defendant contends prosecution under sections 803(f) and 803(g) violates the constitutional prohibitions against ex post facto legislation, and we must reverse his convictions in counts 1 through 12, 16 and 17. We reject defendant's contention and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The amended information charged defendant with sexually molesting S.W. and C.W. on a regular basis between June 3, 1989, and January 1, 1997. Counts 1 through 15 alleged he committed various lewd and lascivious acts upon S.W., and counts 16 through 19 alleged he committed similar acts upon C.W.

Defendant does not challenge the sufficiency of the evidence to support his convictions of counts 1 through 17.

In 1989, defendant lived with his wife M.W., son P.W., and daughters S.W. and C.W. He and M.W. lived a nudist lifestyle and sometimes went to nudist camps. Around the house, they did almost everything naked while the children were growing up. However, the children started wearing clothes when they were five or six years old.

With respect to S.W., the evidence showed that the offenses occurred in the bedroom defendant shared with the victims' mother M.W. and in the shower attached to that bedroom. Defendant called S.W. to the bedroom, asked her to lie under the covers with him, and rubbed her legs, chest and vaginal area between three and five times a week when she was in kindergarten (age five; 6/3/89 - 6/2/90) through the fifth grade (age 10; 6/3/94 - 6/2/95), and about once a week when she was in the sixth grade (age 11; 6/3/95 - 6/2/96). He also laid on his back, pulled S.W. on top of him, and rubbed her body against his hard penis at least once a week when she was in kindergarten through the second grade (ages five through seven; 6/3/89 - 6/2/92). Defendant took showers with S.W., and made her wash his body, including his penis, at least once a week when S.W. was in kindergarten through the fifth grade (ages five through ten; 6/3/89 - 6/2/95) and about once a month when S.W. was in the sixth grade and one time when she was in the seventh grade (ages 11 and 12; 6/3/95 - 1/1/97). S.W. told her mother about the molestations in July 2000, after her parents had separated.

The information paired the offenses committed upon S.W. in the bedroom and in the shower, alleging seven one-year periods and one seven-month period as follows:

<u>Counts</u>	<u>Location</u>	<u>Dates</u>
1 & 2	shower & bedroom	6/3/89 - 6/2/90
3 & 4	shower & bedroom	6/3/90 - 6/2/91
5 & 6	shower & bedroom	6/3/91 - 6/2/92
7 & 8	shower & bedroom	6/3/92 - 6/2/93
9 & 10	shower & bedroom	6/3/93 - 6/2/94
11 & 12	shower & bedroom	6/3/94 - 6/2/95
13 & 14	shower & bedroom	6/3/95 - 6/2/96
15	shower or bedroom	6/3/96 - 1/1/97

As to C.W., the evidence showed defendant showered with her, washed her vaginal area, and made her wash and rub his penis about once a week when she was in kindergarten (age five; 7/12/87 - 7/11/88), about once every other week when she was in first grade (age six; 7/12/88 - 7/11/89), once or twice a month when she was in second grade (age seven; 7/12/89 - 7/11/90) and a few times when she was in the third grade (age eight; 7/12/90 - 7/11/91). One weekend in late 1992 or early 1993, defendant led C.W. into an empty office at his steel fabrication business in Sacramento. He put his cupped hand over her hand and moved it up and down on his erect penis until he ejaculated into a towel. M.W. asked C.W. about the molestations in July 2000, about a week after S.W. revealed the offenses defendant committed against her. The information alleged in count 16 that the offense at defendant's business in Sacramento occurred

between 7/12/92 and 7/11/93, and in count 17 that an offense occurred in the shower between 7/12/90 and 7/11/91.

DISCUSSION

The statute of limitations for violations of section 288, subdivision (b)(1), is six years (§ 800) and had expired on all but counts 13, 14 and 15 when the prosecution filed its complaint against defendant on July 9, 2001. However, the amended information alleged, and the jury found, that counts 1 through 12 were commenced pursuant to section 803(f),² and that counts 16 through 17 were commenced pursuant to section 803(g).³

² At the time of trial, section 803(f) read in relevant part:

"(f)(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a responsible adult or agency by a child under 18 years of age that the child is a victim of a crime described in Section . . . 288

"(2) For purposes of this subdivision, a 'responsible adult' or 'agency' means a person or agency required to report pursuant to Section 11166. This subdivision applies only if both of the following occur:

"(A) The limitation period specified in Section 800 or 801 has expired.

"(B) The defendant has committed at least one violation of Section . . . 288 . . . against the same victim within the limitation period specified for that crime in either Section 800 or 801.

"(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1990, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs: [¶] . . . [¶]

"(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision."

³ At the time of trial, section 803(g), read in relevant part:

Enacted in 1984 (Stats 1984, ch. 1270, § 2, pp. 4335-4336), section 803 set forth the exceptions to the six-year and three-year statutes of limitations found in sections 800 and 801. (*People v. Frazer* (1999) 21 Cal.4th 737, 743 (*Frazer*), overruled in part by *Stogner, supra*, 539 U.S. at p. 610.) Following a national trend beginning in the late 1980's, the California Legislature took steps to increase the time within which criminal charges could be filed in cases involving young victims of sexual abuse. (*Frazer, supra*, 21 Cal.4th at pp. 744-745.) The Legislature added subdivision (f) to section 803 in 1989. Section 803(f) read in relevant part:

"(g) (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section . . . 288

"(2) This subdivision applies only if both of the following occur:

"(A) The limitation period specified in Section 800 or 801 has expired.

"(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

"(3) (A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs: [¶] . . . [¶]

"(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision."

"(f) Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a responsible adult or agency by a child under 17 years of age, that the child is a victim of a crime described in Sections . . . 288

"For purposes of this subdivision, a 'responsible adult' or 'agency' means a person or agency required to report pursuant to Section 11166. This subdivision shall only apply if:

"(1) The limitation period specified in Section 800 or 801 has expired, and

"(2) The defendant has committed at least one violation of Section . . . 288 . . . against the same victim within the limitation period specified for that crime in either Section 800 or 801." (Stats. 1989, ch. 1312, § 1, p. 5270, eff. Jan. 1, 1990.)

The Legislature added subdivision (g) to section 803 in 1993. Section 803(g) read in relevant part:

"(g) Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section . . . 288 This subdivision shall apply only if both of the following occur:

"(1) The limitation period specified in Section 800 or 801 has expired.

"(2) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation which is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. . . ." (Stats. 1993, ch. 390, § 1, p. 2226, eff. Jan. 1, 1994.)

"Prosecutors promptly invoked the foregoing provisions to file child molestation charges based on the time at which the victim reported the crime, regardless of when the crime occurred or when the statute of limitations otherwise expired." (*Frazer, supra*, 21 Cal.4th at p. 745.) Relying primarily on "the absence of explicit language in the 1994 law stating that [section 803(g)] 'revived' the state's ability to prosecute defendants against whom the fixed statute of limitations had run before 1994," some courts held that section 803(g) did not apply where the crime was time-barred on the effective date of the statute. (*Frazer, supra*, 21 Cal.4th at pp. 745-746.) The Legislature responded in 1996 with amendments that "identified in greater detail the cases that could be prosecuted despite delayed reporting of the crime." (*Id.* at p. 746.) Under the amendment, section 803(f) now read in part:

"(3) (A) Effective July 1, 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1990, the effective date of this subdivision, and if the complaint is filed within the time period specified in this subdivision, it shall revive any cause of action barred by Section 800 or 801.

"(B) Effective January 1, 1997, through June 30 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1990, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if either of the following occurs:

"(i) The complaint is filed within the time period specified in this subdivision.

"(ii) The victim made the report required by this subdivision to a responsible adult or agency between January 1, 1990, and January 1, 1997, and a complaint was not filed within the time period specified in this subdivision or was filed within the time period but was dismissed, and a complaint is filed or refiled on or before June 30, 1997." (Stats. 1996, ch. 130, § 1.)

The Legislature added a similar amendment to section 803(g), which now read in part:

"(3) (A) Effective July 1, 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and if the complaint is filed within the time period specified in this subdivision, it shall revive any cause of action barred by Section 800 or 801.

"(B) Effective January 1, 1997, through June 30, 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if either of the following occurs:

"(i) The complaint is filed within the time period specified in this subdivision.

"(ii) the victim made the report required by this subdivision to a law enforcement agency between January 1, 1994, and January 1, 1997, and a complaint was not filed within the time period specified in this subdivision or was filed within the time period but was dismissed, but a complaint is filed or refiled on or before June 30, 1997." (Stats. 1996, ch. 130, § 1.)

Defendant contends that the 1996 amendments to sections 803(f) and 803(g) operated to revive time-barred prosecutions, not simply to extend the statute of limitations for the listed offenses, and were unconstitutional under *Stogner*. Thus, defendant argues, he is entitled to reversal of his convictions on counts 1 through 12, 16 and 17. He maintains that if counts 16 and 17 are reversed, we must also vacate the multiple victim finding. Alternatively, defendant contends that even if we were to conclude sections 803(f) and 803(g) operated to revive time-barred prosecutions *and* to extend the statute of limitations for certain crimes, the extension was not clearly part of the statute until the 1996 amendments became effective on January 1, 1997. Until that time, the presumption against retroactivity made sections 803(f) and 803(g) prospective only. The 1990 and 1994 versions of the statutes were not retroactively applicable to offenses committed before those dates. Thus, according to defendant, counts 1, 2 and 17 must be reversed because they were time-barred before the Legislature expressly attempted to make

sections 803(f) and 803(g) retroactive through the 1996 amendment.

We reject both arguments as meritless. Sections 803(f) and 803(g) apply to limitations periods that were *unexpired* when the Legislature added those subdivisions in 1990 and 1994.

(*Stogner, supra*, 539 U.S. at p. 632; *People v. Renderos* (2003) 114 Cal.App.4th 961, 965.)

A new law that inflicts punishment where the accused was not, by law, liable for any punishment, violates the ex post facto clauses of the state and federal Constitutions. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9; *Collins v. Youngblood* (1990) 497 U.S. 37, 42 [111 L.Ed.2d 30, 38-39]; see also *Stogner, supra*, 539 U.S. at pp. 613-614.) In *Stogner*, the United States Supreme Court cited this principle and held that section 803(g) was unconstitutional as to crimes already time-barred when the Legislature enacted the subdivision effective January 1, 1994. (*Stogner, supra*, at pp. 609, 632.)

In 1999, the California Supreme Court held section 803(g) can be applied, without violating ex post facto principles, to preexisting allegations not time-barred when the section was adopted. (*Frazer, supra*, 21 Cal.4th at pp. 742-743.) The *Frazer* court also concluded the 1996 amendment was a clarification of, and not a change to, the original version of section 803(g). (*Frazer, supra*, 21 Cal.4th at p. 753.)

Four years later, *Stogner* held section 803(g) violated the ex post facto clause as to crimes already time-barred when the Legislature enacted the subdivision effective January 1, 1994.

(*Stogner, supra*, 539 U.S. at p. 609.) The decision in *Stogner* did "not prevent the State from extending time limits for the prosecution of future offenses, or for prosecutions not yet time barred." (539 U.S. at p. 632.) Thus, *Stogner* disapproved of *Frazer* on the question whether ex post facto principles applied to an already expired statute of limitations, but did "nothing to questions answered in the *Frazer* opinion that do not have constitutional underpinnings." (*People v. Robertson* (2003) 113 Cal.App.4th 389, 393.) "The question whether the legislative change in 1996 was a clarification of the previous statute or was intended to be a material change to the existing statute is purely a question of California law. The *Frazer* court found that the 1996 amendment was to repudiate the earlier Court of Appeal decisions finding that the statute was not retroactive and the '1996 amendment sought to "clarify," through express "retroactivity" and "revival" provisions.' (*People v. Frazer, supra*, 21 Cal.4th at p. 753.) Thus the California Supreme Court held the 1996 amendment was a clarification of, not a change to, the original version of 1994. We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)" (*People v. Robertson, supra*, 113 Cal.App.4th at p. 393.)

As to section 803(f), the Legislature could extend the limitations period on causes of action not time-barred as of January 1, 1990, the effective date of the original statute. Counts 1 through 12 were not time-barred on that date. The six-year statute of limitations ran on counts 1 and 2, involving the earliest period of molestation, on June 2, 1996. Similarly, the

Legislature could extend the limitations period for section 803(g), so long as the causes of action were not time-barred as of January 1, 1994, the effective date of the original statute. The six-year statute of limitations ran on count 16 on July 11, 1999, and on count 17 on July 11, 1997.

Based on the foregoing, we conclude defendant's prosecution was not barred by the ex post facto clauses of the state and federal Constitutions.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.